IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 1629 of 2006
In
SPECIAL CIVIL APPLICATION No. 22734 of 2006

WITH

LETTERS PATENT APPEAL NO.1630 OF 2006
IN
SPECIAL CIVIL APPLICATION NO.21083 OF 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? No

2 To be referred to the Reporter or not ? No

3 Whether their Lordships wish to see the fair copy of the judgment ? No

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? No

5 Whether it is to be circulated to the civil judge ? No

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S.K.KADRI - Appellant(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :
MR GUNVANT R THAKAR for Appellant
MR MIHIR JOSHI, ADDL. ADVOCATE GENERAL WITH MS REETA CHANDARANA, AGP for the Respondents 1- 2
None for Respondent(s) : 3 - 4.

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 28/06/2007

CAV JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. These Letters Patent Appeals under clause 15 of the Letters Patent are directed against the common judgement and order dated 22nd November, 2006 passed by the learned Single Judge in Special Civil Applications No.22734 of 2006 and 21083 of 2006.

2. Briefly stated, the facts of the case are that the appellants/original petitioners (hereinafter for the sake of convenience referred to as the petitioners) are working as Under Secretaries under the Legal Department of the Government of Gujarat. In the Final Seniority List issued by the said department, the names of the petitioners were shown at serial No.31 and 33, whereas that of the respondent No.4 was shown at serial No.35. Rule 11(3)(a) of the Gujarat Civil Services and Recruitment (General) Rules, 1967 (hereinafter referred to as “the Rules”) originally provided that the appointment by promotion to the post of the Head of the Department or equivalent thereto or the higher post than that of the Head of the Department,

shall be made on the principles of 'selectivity' irrespective of the seniority classifying the officers within the zone of consideration, namely 'outstanding' 'very good' and 'good' 'unfit'. It was further provided that the select list for promotion to the aforesaid posts shall be drawn by placing the names of 'outstanding' officers in order of their inter se seniority at the top, followed by the officers classified as 'very good' in order of their inter se seniority and then the officers classified as 'good' in order of their inter se seniority. The promotion of such officers was to be considered in order of rank in the Select List so drawn.

3. By the impugned Notification dated 29th October, 2005, sub-rule 3(a) of Rule 11 was substituted which inter alia provided that *"The officers who are graded as "Good" or "Unfit" shall not be included in the select list"*, and sub-rule 4(a) was inserted after sub-rule (3) of Rule 11 of the Rules which provided that *"Notwithstanding anything contained in sub rules (1) and (2) "Very Good' shall be the bench mark for being considered fit for promotion from the lowest rung of Class-I to the next immediate higher level in a hierarchy."*

4. The Government also issued a Resolution dated 29th October, 2005 which interalia laid down that for the purpose of being eligible for inclusion in the Select List for promotion to the first level of Class-I post to the second

level of Class-I post, the confidential reports of the Government servant for the last ‘eight years’ instead of ‘five years’, as at present, should be taken into consideration, out of which, at least in confidential reports for five years, the incumbent should have been graded as ‘very good’ or ‘outstanding’.

5. Pursuant to the amended Rules, by a Notification dated 30th September, 2006, the respondent No.4 Shri R.M. Bhavsar was promoted to the post of Deputy Secretary.

6. It is the case of the petitioners that the aforesaid amendments in the Rules have an adverse impact on the future prospects of the petitioners, hence, being aggrieved by the said rules as well as the promotion given to the respondent No.4 in pursuance thereof, they had approached this Court by way of the above referred Special Civil Applications praying for the following substantial reliefs:

“7. xxxxxx the Honourable court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction to the respondent-authority and may be pleased to :-

(A) allow this petition with costs;

(B) quash and set aside the Government Notification No.GS/2005/35/CRR/102005/ 1008/G2 dated 29/10/2005 as far as it affects the accrued rights of the petitioner being eligible to be considered

for further promotion from the post of lower Class-I to the higher Class-I post and also declare that the provisions contained in inserted sub-rule 4(a), that 'very good' shall be the benchmark for being considered it for promotion from the lowest rung of Class-I to the next higher level in the hierarchy, is also unconstitutional and bad in law;

(C) quash and set aside the Government Circular No.CRR/102005/1008/G2 dated 29/10/2005 issued by G.A.D. by which Government has declared that the officers graded as 'good' will be treated as 'unfit' and their cases will not be considered for further promotion to the higher post in Class-I cadre, as it is unconstitutional as discussed above;

(D) quash and set aside the Notification No.MHK/102005/2934/F dated 30/9/2006 issued by respondent No.1, as it is in violation to the provisions of Articles 14 and 16 of the Constitution of India, as it is issued on the basis of the Government Notification dated 29/10/2005 and Circular dated 29/10/2005 issued by respondent No.2."

7. By the impugned judgement and order, the learned Single Judge has rejected the petitions in limine, which has given rise to the present Letters Patent Appeals.

8. Heard, Mr. G.R. Thakar, learned Advocate for the petitioners and Mr. Mihir H. Joshi, learned Additional Advocate General with Ms. Reeta Chandarana, learned Assistant Government Pleader for the respondents.

9. Learned Advocate, Mr. Thakar has submitted that by virtue of the impugned Notification, Clause

(a) of sub-rule (3) of Rule 11 of the Rules has been substituted which interalia provides that officers graded as ‘good’ or ‘unfit’ shall not be included in the select list. It was submitted that earlier since evaluation as ‘good’ was enough for the purpose of satisfying the bench mark for promotion, the Superior officers would have written the confidential reports at the relevant time on that basis. However, consequent to the amendment, such Government servant who has been assessed as ‘good’ will now be deprived of his right to promotion. It was further submitted that the provision of clause (a) of sub-rule (3) of Rule 11 directly affects the chances of promotion of the concerned officer and the ‘Good’ gradation given to him in the past few years would be treated as unfit and accordingly, was akin to an adverse remark without the same having been communicated to him at any time and without affording him any opportunity for giving any explanation or hearing with regard to the same. It was therefore submitted that the last portion of clause (a) which provides that officers who are graded as ‘good’ or ‘unfit’ shall not be included in the select list was violative of Articles 14 and 16 of the Constitution of India and was required to be quashed and set aside.

9.1 It was next contended that paragraph 2(a) of the impugned Government Resolution dated 29th October, 2005 provides that the Departmental Selection Committee is required to consider

the Confidential Reports for the last eight years as on the date of the meeting of the Committee. Provision is also made for the manner in which the eight years are to be calculated in certain peculiar circumstances. It was urged that though there is no provision even in the amended rules for giving retrospective effect to the same, the effect of aforesaid provision of the impugned Government Resolution which makes it mandatory for the Departmental Selection Committee to consider last eight years Confidential Reports and even if the gradation given by the reporting officer is ‘good’ the case of such officer cannot be considered for further promotion from lower Class-I post to higher Class-I post, is retrospective in nature. It was submitted that by giving retrospective effect to the amended rules, the benefit, which has already accrued in favour of the petitioners, is sought to be taken away, which is violative of the petitioners’ fundamental rights. In support of his contentions, the learned Advocate for the petitioners placed reliance upon the decisions of the Apex Court in the case of ***Sajjan Singh v. State of Rajasthan***: AIR 1965 SC 845, ***B.S. Vadera v. Union of India***: AIR 1969 SC 118, ***Income-tax Officer v. M.C.Ponnose***: AIR 1970 SC 385, ***State of J.& K. v. Triloki Nath Khosa***: AIR 1974 SC 1, ***The Accountant General and another v. S. Doraiswamy and others***: AIR 1981 SC 783, **State**

of Gujarat v. Ramanlal Keshavlal Soni: AIR 1984 SC 161, ***B.S. Yadav v. State of Haryana***: AIR 1981 SC 561, ***P.D. Aggarwal and others v. State of U.P.***: AIR 1987 SC 1676, ***Ex-Capt. K.C. Arora v. State of Haryana***: AIR 1987 SC 1858, ***Commissioner of Income-tax, U.P. v. Bazpur CO-operative Sugar Factory Ltd. Bazpur***: AIR 1988 SC 1263, ***K. Narayanan v. State of Karnataka***: AIR 1994 SC 55, ***P. Ravindranath Pai v. State of Karnataka***: AIR 1995 SC 1978, ***Chairman, Railway Board and others v. Rangadhamaiah and others***: AIR 1997 SC 3828 and ***P. Mohan Reddy v. E.A.A. Charles***: AIR 2001 SC 1210.

9.2 It was further submitted that by providing for taking into consideration the Confidential Reports of the last eight years, the impugned Government Resolution has given effect to the amended Rules with retrospective effect of eight years from the date of meeting of the Departmental Promotion Committee. That the impugned Government Resolution was in the nature of administrative instructions, hence, the same could not over-rule or override the provisions of the statutory Rules. Reliance was placed upon the decisions of the Apex Court in the case of ***B.N. Nagrajan and others v. State of Karnataka***, 1979 (3) SCR 937 and in the case of ***Secretary, State of Karnataka and others v. Umadevi*** **and others**, JT 2006 (4) SC 420.

9.3 The next contention raised by the learned Advocate for the petitioners was that the vacancies that have arisen prior to the amendment of the Rules were required to be filled in, in accordance with the un-amended rules and that the Government had no authority to fill up all the posts to the promotional cadre, i.e. Deputy Secretary as per the amended Rules and policy. In support of his contention, reliance was placed upon the decisions of the Apex Court in the case of ***B.L. Gupta and another v. M.C.D***., (1998) 9 SCC 223 as well as in the case of ***State of Rajasthan v. R. Dayal***, (1997) 10 SCC 419.

9.4 It was also contended that certain duties were cast upon the Union and the State Public Service Commissions under Article 320 of the Constitution of India. It was submitted that Clause (3) of Article 320 provides for matters in which the State Public Service Commissions are required to be consulted. Sub-clause (a) thereof relates to all matters relating to methods of recruitment to civil services and for civil posts and sub-clause (b) relates to principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions and transfers. It was submitted that it was accordingly, incumbent upon the State

Government to consult the Gujarat Public Service Commission before amending the rules, however, the Gujarat Public Service Commission had not been effectively consulted before amending the rules.

9.5 It was further submitted that pursuant to the impugned Notification and Government Resolution, by a Notification dated 30th September, 2006, the respondent No.4 had been promoted from the post of Under Secretary to Deputy Secretary, disregarding the seniority of the petitioners. It was contended that if the petitioner is within the zone of consideration, it is his fundamental right to be considered for promotion and that the vacancies are required to be filled up on the basis of the un-amended rules. Accordingly, the Notification dated 30th September, 2006 whereby the respondent No.4 has been given promotion disregarding the rights of the petitioners, is required to be quashed and set aside.

10. Mr.Mihir Joshi, learned Additional Advocate General has submitted that the Rules of 2005 as well as the impugned Government Resolution have been issued in consultation with the Gujarat Public Service Commission. Drawing attention to communications dated 25th August, 2005 and 17th September, 2005 and the Government Notification dated 22nd June, 2006 it was pointed out that by virtue of the said Notification, the Rules of

1967 have been further amended to provide that the Rules of 2005 shall not be applicable in cases of promotion of such officers in respect of whom the select list/s had already been approved by the Government on or before 29th October, 2005. It was further submitted that the petitioners were not placed on any approved selected list prior to 2005; hence the petitioners had no indefeasible right to promotion. It was contended that there was no question of retrospectivity in the operation of the impugned Rules, as the same do not affect any vested right. It was pointed out that in case of the petitioners, the time to be considered had not come when the rules were amended. It was submitted that the benchmark for promotion to the higher echelons in the Class-I service had been raised to ensure that posts at the top level are occupied by persons with a higher level of competence. Lastly it was submitted that no malafides had been alleged which is the only ground available in relation to policy decisions. Moreover, no special prejudice had been pointed out by the petitioners.

11. Upon hearing the learned Advocates and considering the rival submissions, at the outset it would be pertinent to refer to the Rules as they stood before the amendment and thereafter. Rule 11(3)(a) of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 prior to its amendment reads as under:

"11-"3(a) Notwithstanding anything contained in any rules in force relating to the recruitment to the post of head of the Department or equivalent thereto or the higher post than that of the Head of Department, the appointment by promotion to the aforesaid posts shall be made on the principles of 'selectivity' irrespective of the seniority, classifying the officers within the zone of consideration, namely, "outstanding," "very good" and "good" "unfit". The Select List for promotion to the aforesaid posts shall be drawn by placing the names of "outstanding" officers in order of their inter se seniority at the top, followed by the officers classified as "very good" and then the officers classified as "good" in order of their inter se seniority. The promotion of such officers shall be considered in order of rank in the Select List so drawn.

(b) The zone of consideration for the purpose of clause (a) shall be such as the State Government may from time to time determine.

(c) The State Government shall form a Top Level Committee for selection of persons to the post mentioned in clause (a)."

Vide Notification dated 29th October, 2005 the aforesaid sub-rule (3)(a) of Rules 11 of the Rules has been substituted by the following:

"(a) Notwithstanding anything contained in any rules as in force relating to the promotion to a Class-I post, barring the posts of first two lowest levels of Class-I in a hierarchy, the appointment by promotion to such posts shall be made on the principles of "Selectivity" irrespective of the seniority. The Selection Committee shall classify the eligible officers, within the zone of consideration as "Outstanding", "Very Good", "Good" or "Unfit" as the case may be on an overall relative assessment of their service records. The Select List shall be prepared by including the required number of Officers, first from amongst

the officers finally classified as 'Outstanding' and then from amongst those similarly classified as 'Very Good', and the order of names inter-se within each category shall be in the order of their seniority. The promotion of such officers shall be considered in order of rank in the Select List so prepared. The Officers who are graded as "Good" or "Unfit" shall not be included in the select list."

The said Rules have been further amended by inserting Sub-rule 4(a) after sub-Rule (3), which reads as under:

"4.(a) Notwithstanding anything contained in sub rules (1) and (2) "Very Good" shall be the bench mark for being considered fit for promotion from the lowest rung of Class-I to the next immediate higher level in a hierarchy.

(b) The zone of consideration for the purpose of clause (a) shall be such as the State Government may determine from time to time."

11.1 Thus, by virtue of the amended rules barring the posts of first two lowest levels of Class-I in an hierarchy, the appointment by promotion to Class-I posts shall be made on the principles of "Selectivity" irrespective of the seniority. The issue involved in the present case is appointment by promotion from the post of Under Secretary to the post of Deputy Secretary, which admittedly falls within the first two lowest levels of Class-I. However, under the provisions of sub-rule 4(a) it has been provided that "Very Good" shall be the benchmark for promotion from the lowest rung of Class-I to the next immediate

higher level in a hierarchy. Therefore, those officers who are graded lower than “Very Good” would stand ousted from the zone of consideration for being promoted to the next immediate higher level.

11.2 Sub clause (b) of sub-rule (3), as well as sub-rule (4) of Rule 11 provide that the zone of consideration for the purpose of clause (a) shall be such as the State Government may from time to time determine. Accordingly, vide Government Resolution dated 29th October, 2005 the Government has framed guidelines which are to be kept in mind while considering promotion from the lower level posts of Class-I to higher level posts of Class-I. Under the said Government Resolution it has been provided that while preparing the select list for promotion from the first level post of Class-I to the Second level post of Class-I, instead of the confidential reports of the last five years, the confidential reports of the last eight years shall be taken into consideration. From the eight years confidential reports of the concerned officer, which have been taken into consideration, for at least five years the gradation of his confidential reports should be ‘very good’ or ‘outstanding’. That is out of the last eight years confidential reports of the concerned officer, the confidential reports of at least five years should have been evaluated as “Very Good” or

"Outstanding".

11.3 The petitioners are also aggrieved by these guidelines insofar as the same provide for consideration of eight years confidential reports instead of five years as was the practice earlier as well as the requirement for having been graded "Very Good" and "Outstanding" for at least five years. These guidelines according to the petitioners are retrospective in operation.

11.4 The basis for challenging the impugned Rule and Government Resolution is that earlier as gradation of "good" in the Confidential Reports did not disentitle an officer from being considered for promotion to the higher Class-I post, the reporting and reviewing authorities would have written the confidential reports keeping that aspect in mind. Moreover, being graded as "good" did not amount to an adverse remark, hence, the same was not communicated to the concerned officer and as such he had no cause or opportunity to challenge the same. Now, in the changed circumstances, gradation of 'good' was as good as unfit, as the same disqualified an officer from being considered for promotion. The very basis for such an argument is fallacious. The learned Single Judge has rightly held that the confidential report is written on the basis of the performance of an officer and has no

connection whatsoever wih the rules of promotion.

11.5 Insofar as the challenge to sub-rule 3(a) and sub-rule 4(a) of Rule 11 of the Rules whereby the benchmark for promotion has been raised by providing that that officers who are graded as “Good” or “Unfit” shall not be included in the select list; and that “very good” shall be the bench mark for being considered fit for promotion from the lowest rung of Class-I to the next immediate higher level in a hierarchy respectively, is concerned, the same is purely a policy decision falling within the domain of the State Government. No fault can be found with such a policy, which requires higher level of competence within the higher echelons of the administration. The learned Single Judge has rightly held that what should be the criteria for promotion and how the selection for promotion should be made are wholly administrative matters to be decided by the Government. Unless the action of the Government is arbitrary or discriminatory or is vitiated by malafide, interference by the Court in exercise of power of judicial review under Article 226 of the Constitution of India is strictly prohibited. The learned Additional Advocate General has rightly contended that the petitioners have not alleged any malafides, which is the only ground available in relation to policy

decisions. Neither have the petitioners challenged the same on the ground of the same being arbitrary or discriminatory.

11.6 As regards that contention that by virtue of the impugned Government Resolution, which provides for taking into consideration the confidential reports of the last eight years, the amended rules have been given retrospective effect, the learned Single Judge has rightly held the same to be fallacious.

11.7 The learned Advocate for the petitioners has in support of his arguments pressed into service several decisions of the Apex Court on the question of retrospective operation of rules. It would not be necessary to dwell at length upon the said decisions, as the very contention regarding retrospective operation of the rules is fallacious. On a plain reading of the rules there is nothing to show that the same have in any manner been made operative retrospectively. The mere fact that the benchmark for promotion has been raised and that the last eight years service record is to be taken into consideration for that purpose cannot be construed to mean that the rules have been made retrospective in operation.

11.8 The Supreme Court in the case of ***State of J. & K. v. Triloki Nath Khosa*** : AIR 1974 SC 1,

while dealing with the question as to whether applying a service rule to existing employees would characterize the operation of the said rules to be retrospective, held as follows:

> *"An argument which found favour with Mufti Bahauddin J., one of the learned Judges of the Letters Patent Bench of the High Court, and which was repeated before us is that the "retrospective'' application of the impugned rules is violative of Articles 14 and 16 of the Constitution. It is difficult to appreciate this argument and impossible to accept it. It is wrong to characterise the operation of a service rule as retrospective for the reason that it applies to existing employees. A rule which classifies such employees for promotional purposes undoubtedly operates on those who entered service before the framing of the rule but it operates in future, in the sense that it governs the future right of promotion of those who are already in service. The impugned rules do not recall a promotion already made or reduce a pay-scale already granted. They provide for a classification by prescribing a qualitative standard, the measure of that standard being educational attainment. Whether a classification founded on such a considerations suffers from a discriminatory vice is another matter which we will presently consider but surely, the rule cannot first be assumed to be retrospective and then be struck down for the reason that it violates the guarantee of equal opportunity be extending its arms over the past. If rules governing conditions of service cannot ever operate to the prejudice of those who are already in service, the age of superannuation should have remained*

immutable and schemes of compulsory retirement in public interest ought to have foundered on the rock of retroactivity. But such is not the implications of service rules nor is it their true description to say that because they affect existing employees they are retrospective. It is well settled that though employment under the Government like that under any other master may have a contractual origin, the Government servant acquires a 'status' on appointment to his office. As a result, his rights and obligations are liable to be determined under statutory or constitutional authority which, for its exercise, requires no reciprocal consent. The Government can alter the terms and conditions of its employees unilaterally and though in modern times consensus in matters relating to public services is often attempted to be achieved consent is not a pre-condition of the validity of rules of service, the contractual origin of the service notwithstanding."

11.9 Various decisions have been cited by the learned Advocate for the petitioners for the proposition that the amended rules can be made applicable only to future vacancies and that the vacancies existing prior to the coming into force of the amended rules are required to be filled in under the old rules. The learned Single Judge has considered the decisions cited by the learned Advocate and has held as follows:

"As it would be already noticed in the present set of rules, the State Government or the appointing authority has not been

given any option or discretion to revise the select list as existing on the date of the appointment. On the contrary, the Notification dated 22nd June, 2006 made it mandatory for the Government or the appointing authority to make appointments from the select lists which were already approved prior to the date of the Rules of 2005. In other words, if on the date of the Rules of 2005 the approved select list was not existing, by necessary implication, the Government or the appointing authority is required to make selection in accordance with the Rules of 2005 and to fill in all the existing vacancies by operating such select list. Thus, the contention that the vacancies existing on the date of the Rules of 2005 shall be filled in in accordance with the Rules of 1967 as they stood prior to the Rules of 2005 requires to be rejected. Besides, there cannot be two separate selection procedures at one and the same selection process for two sets of vacancies. In my opinion in such circumstances, in absence of specific rules to the contrary, the only prudent way the selection can be made is to make selection in accordance with the law in force on the day the selection is made" We are in complete agreement with the aforesaid reasoning adopted by the learned Single Judge.

11.10 In view of the statement made by the learned

Additional Advocate General that the Rules of 2005 as well as the impugned Government Resolution have been issued in consultation with the Gujarat State Public Service Commission, the contention regarding non-consultation with the Gujarat State Public Service Commission does not survive.

12. For the reasons stated hereinabove as well as for the reasons adopted by the learned Single Judge, we find no merit in these Letters Patent Appeals so as to warrant any interference by this Court. The appeals are therefore, summarily dismissed.

13. Registry shall place a copy of this order in both the appeals.

[ANIL R. DAVE, J.]

[HARSHA DEVANI, J.]

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